No. 9681.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 207,

Appellant,

vs.

WALTER P. SPRECKELS, individually, and as Regional Director, 21st Region, of the National Labor Relations Board,

Appellee.

APPELLANT'S REPLY BRIEF.

REDMOND S. BRENNAN,
W. I. GILBERT, JR.,
JEAN WUNDERLICH,
939 Rowan Building, Los Angeles,
Attorneys for Appellant.

Parker & Baird Company, Law Printers, Los Angeles.

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TABLE OF AUTHORITIES CITED.

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Preliminary Statement.

Defendant's brief is an ingenious attempt to sidestep the real issues in the case. It recognizes in an oblique way that the complaint charges him with the commission of acts which are not in the remotest sense a portion of his duties as an agent of the Board. But, "stripped of these matters", we are told the complaint involves only a "routine performance by the Board and appellee of their functions and duties under the act".

The matters which are to be "stripped" off plaintiff's complaint, however, are the ones that give this controversy its particular status and color. Defendant gives no reason

why the complaint should thus be "stripped". These are precisely the matters which give rise to the important questions whether extra-legal utterances and activities under the cloak of official status can be interfered with by injunctive process, or, whether such extra-legal utterances and activities, since they cannot be properly and effectively reviewed by the review machinery of the statute, must go unremedied to the irreparable injury of the plaintiff.

The Question Involved.

The question, therefore, is not whether the District Court has jurisdiction to enjoin an agent of the Board from the performance of his official function, but the question is:

Does an agent perform an official function when he "wrongfully" intimidates and causes "said employer and numerous employees of said plant who were members, and are members, of plaintiff, and embraced within said contract, from the performance of said contract and from complying with the full obligations . . . thereof" [R. p. 4], and where he authorizes and encourages "one Harry Bridges and others who claimed to be affiliated with the labor organization known as the C.I.O., to declare and proclaim to said employees that said contract was void?" [R. p. 4].

That these charges are serious, and that they are the type of charges which the Labor Board, for its own prestige, would want to have investigated by a tribunal other than itself would seem obvious.

On the contrary, however, its agent seeks refuge behind the untenable claim of administrative immunity, by sug-

gesting that an inquiry of the nature stated in the complaint should be brought before its own trial examiners, whose findings as to the facts—if supported by evidence, no matter how conflicting—would then be binding upon the reviewing Circuit Court of Appeals.

The plain fact is that plaintiff's particular grievance touching the extra-official activities of defendant, performed under color of office, can not under any provisions of the National Labor Relations Act be brought to a hearing before that Board. Nor does defendant point out what review can be had of the activities of which he suggests the complaint should be "stripped".

Reply to Point I.

The "conclusions and factually unsupported inferences which permeate" (Appellee's Br. p. 7) the complaint, according to the Board's conception are not within the realm of "conclusions and unsupported inferences". Not by way of innuendo, nor by way of bringing before this court matters which are absent from the complaint, but solely to show that plaintiff's charges are not utterly capricious and fantastic, but comport with the findings of an inquiry of a coordinate branch of the government, we refer to the final report of the Special Committee of the House of Representatives, 76th Congress, appointed pursuant to H. Res. 258 to Investigate the National Labor Relations Board, printed in Volume 7, #18, Special Supplement of the Labor Relations Reporter issued in Washington, D. C., on December 30, 1940. In it there are discussed and documented not only extra-legal activities of various subordinates of the Board (pp. 12-22), but a fairly general bias of individual members of the Board in

favor of the C.I.O. and against the A.F. of L. is intimated (see p. 37). The conclusions of the inquiry on the basis of the evidence are stated on page 52 of this report, which we refrain from quoting only in order not to be accused of introducing extrajudicial considerations into this proceeding. The foregoing references to the Report have been made only, as already stated, for the purpose of showing that the plaintiff did not have hallucinations, or purely imaginary grievances, and that on the basis of the allegations of the complaint, there is cause for invoking the protection of equity.

The allegations in the complaint concerning defendant's extra-legal activities are not like the allegations in *Hegeman Farms Co. v. Baldwin,* 293 U. S. 163, 170. Why this particular case should be cited in this connection is difficult to see. It merely holds that a complaint for an injunction which states, in effect, that a milk rate set by a regularly appointed body is confiscatory and repugnant to the 14th Amendment of the Constitution is insufficient.

It has never occurred to this plaintiff to even suggest that the United States District Courts could interfere with a routine performance of the Board or its agents. But, on the other hand, it would not occur to the average individual that the matters heretofore quoted from the complaint such as encouraging a rival union or declaring that a contract which its official utterance assumes to be valid, is void, are "routine performances by the Board or its agents".

Defendant's cases, in so far as they hold a statutory proceeding by the Board cannot be interfered with by an injunction (Appellee's Br. pp. 8-9) do not require a reply. Manifestly, except in so far as they are the fruit of unfair

labor practices—which are, of course, not involved in this proceeding—the Board has no power to interfere directly or indirectly with existing contracts. To give the Board such a right, either by legislative action or by statutory construction, would be a violation of the 5th Amendment of the United States Constitution, and would be repugnant and contrary to our accepted concepts of due process and private rights. We are therefore not concerned with the propriety of holding an election, but we are concerned with the question whether and to what extent either by routine performances or by extra-legal activity valid and subsisting contracts can be interfered with.

Reply to Point II.

What we have just said is admitted frankly on page 13 of the Board's brief, as follows: "The proceeding did not adjudicate the validity of the contract, but merely ascertained the employee's choice of representative".

If that is the case, it is difficult to see why the defendant intimidated the employer and numerous employees in the performance of the contract, and why it suggested to Harry Bridges, and others affiliated with the C.I.O., that the contract was void, and that they should proceed on that assumption to negotiate a new and different contract between the C.I.O. and the Cudahy Packing Company, which could, of course, not be suggested in good faith, as long as the contract between the plaintiff and the Cudahy Packing Company was valid.

It is further said in this connection, that the impairment of appellant's prestige and the other losses, such as loss

of dues, and expenses which the Board chooses to overlook "are not required by the certification of the Board or any act of the appellee". If anything that the appellee did, resulted in such loss, we are assured, it was merely one of the "incidents of carrying out the law of the land, which imposes on the Board the power and the duty, in the interest of allaying industrial strikes and protecting commerce, to resolve disputes over representation".

It is obvious that what the appellee did here, leaving aside his "routine performances" could not, under any stretch of the imagination be blamed on an endeavor to carry out the law of the land. Under common notions of constitutional law and fairness in official conduct, what he did extra-legally is diametrically opposed to the law of the land.

It is further asserted that equity relief cannot be based upon imputations of bad faith to public officials in the performance of their duties. There are at least three answers to this statement:

First: The extra-legal activities of the defendant were not a part of his duties. Nothing in the National Labor Relations Act, nor about the Board's duty of "allaying industrial strife and protecting commerce, to resolve disputes over representation" could possibly require the defendant to emanate the information that plaintiff's contract is void, and that the C.I.O. should negotiate a new one, and that the old contract should no longer be performed. If anything, such conduct had exactly the opposite effect.

Second: The cases which are cited on page 13 in support of the statement that equity jurisdiction cannot be based upon imputations of bad faith to a public official do

not support that statement. The latest one of the *E. I. duPont, etc. & Co. v. Boland,* 85 Fed. (2d) 12, 14, makes the assertion (not required by the facts as reflected in the opinion) that equity jurisdiction "cannot be supported by imputing to the Board *an intention* to exercise its powers in an arbitrary or improper manner." (Emphasis ours.)

A future intention is entirely different from a course of action already embarked upon, or immediately threatened. These cases, therefore, are not in point. Quite aside from that, the complaint does not contain imputations of bad faith, but alleges specific conduct under the guise of official action which cannot, by any stretch of the imagination, be considered as such.

Third: The suggestion that courts of equity cannot remedy conduct actuated by bad faith on the part of a public official when such conduct causes loss and injury is an assertion which should find the unanimous condemnation of the judiciary determined to preserve the independence of its function, and to carry out its trust to protect the people against unwarranted encroachments upon their established rights on the part of an over-zealous administrative body.

The Board, finally, makes the suggestion that what has befallen this plaintiff is nothing but "part of the social burden of living under government". In support of that assertion we are referred to *Heller v. Lind,* 86 Fed. (2d) 862, and cognate cases (Appellee's Br. p. 14). In the case referred to the plaintiff alleges that the threatened hearings and the exercise of the "routine powers" of the Board will cause inconvenience, and will be productive of disharmony within the plaintiff's organization. It is utterly strange that officers of a free government will suggest that

irreparable loss, threatening the extinction of a lawful organization, not by reason of "routine performances" of the Board, but by reason of extra-legal activities of its subordinate is "part of the social burden of living under government."

The defendant admits in a footnote (Appellee's Br. p. 11) that other allegations besides those which he chooses to discuss are contained in the complaint, but they are disposed of by saying that they are not allegations of fact, but mere inferences and conclusions. However, the motion of the defendant to dismiss was made on the ground of lack of jurisdiction. It was not made on the ground that appellant's complaint was defective in this particular. Therefore, the point just referred to, even if the conduct of the defendant would permit of more specific allegations, is not seasonably made.

Concerning the assertion that the terms of the National Labor Relations Act afford a full and adequate administrative remedy, we will say this:

At the close of the certification proceedings, as we pointed out in the opening brief, no recourse was open to the plaintiff because the result of certification proceedings is not directly reviewable. It should not be overlooked that the real grievances of plaintiff occurred outside of and apart from those proceedings. The National Labor Relations Act has no provisions for initiating a formal complaint with the Board in Washington, by which the extra-legal conduct of its agent can be reviewed and corrected. This plaintiff has as an ultimate, and only, resort, only a court of equity. Where else, if not to a court of equity could it turn for relief from the consequences of extra-legal interference under the cloak of official action,

if not to a court of equity? Never more than now, and in this particular case, is there occasion for this Honorable Court to guard the established rights of this plaintiff, and in a wider sense to reaffirm the respective spheres of legitimate action of the three coordinate branches of the government. Now, of all times, should the courts be zealous to see that the administrative branch shall not gain the ascendancy over the other two branches to such an extent that official position may be used as a pretext and a screen to destroy rights legimately acquired and to favor one group of citizens in preference to another.

Reply to Point III.

It is not correct to state that the only specific conduct sought to be enjoined is the holding of further hearings and elections, and that since no further hearing and elections are threatened, the subject matter of the complaint has become moot.

The prayer is lengthy, and it requests, among other things, that the defendant be restrained "from issuing, authorizing or publishing any statements interfering with, or tending to interfere with" plaintiff's contract. It also requests that the defendant be enjoined from taking any other or further steps (outside of holding elections) directly or indirectly . . . tending to or having the effect of interfering with, obstructing, intimidating, coercing or influencing (the employer or the plaintiff) . . . from adhering to the terms of the valid contract". The prayer is directed, as can be readily seen, against the extra-legal activities of the defendant, as much as against the holding of any threatened further election.

Since the acts of the defendant are said in the complaint to be continuous, and that similar acts to further interfere with the contract are continuously being threatened, the question cannot be said to have become moot. It would not be moot even if the complaint were directed exclusively against the certification proceedings, because their validity would there be involved.

In Point III we are referred to the proposition that the Board in Washington is an indispensable party to this litigation. We have stated in the opening brief why this cannot be so. We now state, upon an analysis of the authorities on which defendant relies (Appellee's Br. p. 17) that those cases neither suggest nor require the conclusion that the Board is indispensable here. In each of those cases an act authorized by law or by a superior was under consideration. Extra-legal and extra-official acts, such as are being attacked here, were not being discussed. The latest of these cases, *National Conference on Legalizing Lotteries v. Goldman,* 85 Fed. (2d) 66, recognizes the lack of harmony in the cases, but attempts to reach a basis upon which it may be determined when the administrative superior must be made a party to the action, and when this procedure is not necessary.

One test suggested is that where the superior's concurrence in the acts complained of is not required, he need not be joined in the action.

We suspect that in this case the extra-legal activities of the director of the 21st Region not only do not require the concurrence of the members of the Board in Washington, but on the contrary, that they would not have found the concurrence of that body, if its advise had been asked in that respect.

Conclusion.

We respectfully urge, therefore, that this Honorable Court reverse the judgment of dismissal in this case and remand the cause to the United States District Court for the Southern District of California for further proceedings and disposition.

Respectfully submitted,

REDMOND S. BRENNAN,
W. I. GILBERT, JR.,
JEAN WUNDERLICH,
Attorneys for Appellant.